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Notes and Comments

Nally v. Grace Community Church of the Valley: Clergy Malpractice — A Threat to Both Liberty and Life

I. Introduction

The tragic suicide of a young man in California, in 1979, led to a legal battle which seriously threatened first amendment liberties. The threat was clothed in the term "clergy malpractice." In an effort to make the clergy legally accountable for pastoral counseling, actions for clergy malpractice have been suggested in various state courts.¹ The claim was first made in 1980, in *Nally v. Grace Community Church of the Valley*,² and for the next eight years the California courts struggled with the issue.³ The opinions were varied with respect to the rationales espoused.

1. See, e.g., *Handley v. Richards*, 518 So. 2d 682 (Ala. 1987); *Hester v. Barnett*, 723 S.W.2d 544 (Mo. App. 1987); *Strock v. Presnell*, 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988); see also *infra* notes 35-52 and accompanying text.

2. No. NCC 18668-B (L.A. County Super. Ct., filed Mar. 31, 1980), *rev'd and remanded*, 204 Cal. Rptr. 303 (opinion deleted from official reporter by California Supreme Court, see 157 Cal. App. 3d 912 (1984)), *dismissed on motion for nonsuit at trial*, No. NCC 18668-B (L.A. County Super. Ct., filed May 24, 1985), *judgment granting nonsuit rev'd*, 240 Cal. Rptr. 215 (1987) (review granted for California Supreme Court opinion, not printed in official reporter, see 194 Cal. App. 3d 1147 (1987)), *rev'd*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (1989).

3. In 1980, the superior court for Los Angeles County granted summary judgment for the defendants. *Nally*, No. NCC 18668-B (L.A. County Super. Ct., filed Mar. 31, 1980). In 1984, the California court of appeal reversed and remanded. 204 Cal. Rptr. 303. On remand, the superior court entered a nonsuit. *Nally*, No. NCC 18668-B (L.A. County Super. Ct., filed May 24, 1985). The superior court, however, was again reversed by the court of appeal in 1987. 240 Cal. Rptr. 215. In 1988, however, the California Supreme Court reversed the court of appeal and entered a judgment affirming the superior court nonsuit. 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97. The Supreme Court denied certiorari. 109 S. Ct. 1644.

In *Nally v. Grace Community Church of the Valley*⁴ (*Nally II*) the California court of appeal held that the defendant pastors of Grace Church had a legal duty to refer a suicidal counselee to mental health professionals including, but not limited to, psychologists, psychiatrists and therapists. In so holding, the court found that the defendants had failed in that duty by not referring to professionals a counselee who later committed suicide.⁵ There has been considerable commentary on the subject of clergy malpractice,⁶ and the imposition of such a duty is not without support.⁷ Such an imposition, however, is also not without opposition. The two-to-one *Nally II* decision was accompanied by a vigorous dissent written by Justice Cole who stated that first amendment guarantees prohibit such liability.⁸ Much of the legal commentary on clergy malpractice lends support to Justice Cole's position.⁹

Nally II was eventually reversed by the California Supreme

4. 240 Cal. Rptr. 215.

5. *Id.* at 229.

6. See Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN. FERN. V.L. REV. 47 (1981); Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163 (1981); Case Note, *Religious Counseling — Parents Allowed to Pursue Suit Against Church and Clergy For Son's Suicide*, 1985 ARIZ. ST. L.J. 213 (1985) [hereinafter Case Note, *Religious Counseling*]; Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W.L. REV. 507 (1983) [hereinafter Comment, *Whole Cloth*]; Comment, *Clergy Malpractice: Should Pennsylvania Recognize a Cause of Action for Improper Counseling by a Clergyman?*, 92 DICK. L. REV. 223 (1987) [hereinafter Comment, *Pennsylvania*]; Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct be "Free Exercise"?*, 84 MICH. L. REV. 1296 (1986) [hereinafter Note, *Intentional Infliction of Emotional Distress*]; Note, *Clergy Malpractice Claims: A New Problem For Religious Organizations*, 16 N. KY. L. REV. 383 (1988) [hereinafter Note, *A New Problem For Religious Organizations*]; Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 PEPPERDINE L. REV. 137 (1986) [hereinafter Comment, *Lower Power*]; Note, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*, 19 RUTGERS L.J. 419 (1988) [hereinafter Note, *Spiritual Counseling Conflicts*]; Comment, *Clergy Malpractice: Bad News For the Good Samaritan or a Blessing in Disguise?*, 17 U. TOL. L. REV. 209 (1985) [hereinafter Comment, *Bad News For the Good Samaritan*].

7. See generally Bergman, *supra* note 6, at 63-64; Comment, *Bad News For the Good Samaritan*, *supra* note 6, at 248-51; Note, *Spiritual Counseling Conflicts*, *supra* note 6, at 444-45; Comment, *Lower Power*, *supra* note 6, at 148-54; see also *Nally*, 47 Cal. 3d 278, 304, 763 P.2d 948, 964, 253 Cal. Rptr. 97, 113 (Kaufman, J., concurring).

8. *Nally*, 240 Cal. Rptr. at 244.

9. See generally Ericsson, *supra* note 6, at 176-84; Comment, *Whole Cloth*, *supra* note 6, at 525-54; Comment, *Pennsylvania*, *supra* note 6, at 232-39.

Court in *Nally v. Grace Community Church of the Valley*¹⁰ (*Nally III*), where the court, for other than constitutional reasons, refused to impose upon pastoral counselors a duty to refer to mental health professionals.¹¹ Employing a tort analysis, the court rejected the imposition of this duty.¹²

This Note addresses the issue of clergy malpractice in pastoral counseling.¹³ Part II of this Note examines tort liability as applied to clergy malpractice in pastoral counseling, and provides an overview of how a number of state courts have handled the issue. In addition, the first amendment issues raised by such liability are discussed and the tenets of pastoral counseling are presented. Part II also provides statistical information on suicide, along with a look at societal and legislative responses to suicide. Part III sets forth the facts, procedural history, and opinions of the case. Part IV analyzes the *Nally* opinions, with a focus on the first amendment considerations. It explores the nature of secular and nonsecular counseling in relationship to those considerations and, finally, proposes a solution to the problem of counseling suicidal persons. This Note concludes that the first amendment bars actions for clergy malpractice in pastoral counseling and that effective counseling intervention for suicidal persons must include a systematic and integrated approach which encourages understanding and cooperation be-

10. 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97.

11. *Id.* at 299-301, 763 P.2d at 960-61, 253 Cal. Rptr. at 110-11.

12. *Id.*

13. The *Nally* court also found that the trial court acted within its discretion when it excluded evidence which tended to support an action for intentional infliction of emotional distress. *Nally*, 47 Cal. 3d at 300, 304, 763 P.2d at 961, 964, 253 Cal. Rptr. at 110, 113. There was, however, no suggestion that the clergy would not be held liable for intentional infliction of emotional distress under different circumstances. The discussion of a cause of action for intentional infliction of emotional distress is beyond the scope of this Note. Wrongful death actions, based on intentional infliction of emotional distress, are actionable in California. See generally *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987); *Davidson v. City of Westminster*, 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (for an analysis of the elements necessary for such an action); *Tate v. Canonica*, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960). In *Nally III*, the court indicated that, had the facts been different, it would have heard an action for intentional infliction of emotional distress since clergypersons are liable for intentional torts. For a more detailed analysis of the clergy's liability for intentional tort see Note, *Religious Counseling*, *supra* note 6; Note, *Intentional Infliction of Emotional Distress*, *supra* note 6; see also RESTATEMENT (SECOND) OF TORTS § 46 (1)-(2) (1965).

tween the secular and nonsecular world without infringing upon first amendment liberties.

II. Background

A. *Clergy Malpractice as a Tort Cause of Action*

1. *Tort Liability and Duty of Care*

The term "malpractice" refers to professional misconduct — it means the failure to exercise the degree of skill and learning normally used in similar circumstances by members of the same profession.¹⁴ Thus, clergy malpractice infers a professional standard of skill and learning against which the clergy person's alleged misconduct is measured.¹⁵ Although there is no general agreement with respect to what should be actionable under a theory of clergy malpractice,¹⁶ it is clear that it is a theory of tort liability,¹⁷ albeit not intentional tort liability.¹⁸

Liability for clergy malpractice includes the elements necessary for any negligence cause of action. The traditional elements require that there be a duty of care and a breach of that duty which proximately caused actual damage.¹⁹ There must be a violation of a legal duty for a tort to occur.²⁰ It is a question of law whether one person has a legal duty of care toward another person — as is the more specific question of whether he has assumed such a duty by establishing a special relationship with that person.²¹

14. RESTATEMENT (SECOND) OF TORTS § 299A (1965).

15. Bergman, *supra* note 6, at 62-64.

16. See *supra* note 6 and accompanying text.

17. See *infra* notes 35-52, 151-63 and accompanying text.

18. See *supra* note 13.

19. W. PROSSER & R. KEETON, PROSSER AND KEETON ON TORTS § 30 (5th ed. 1984).

20. 5 Witkin, *Summary of California Law* § 6 (Torts) (9th ed. 1988).

21. At common law a defendant is liable only if he bears a special relationship to the dangerous person or to the potential victim. *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 435, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976). In the landmark case of *Rowland v. Christian*, the court concluded that liability should be imposed for an injury caused by a failure to use ordinary care or skill. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). The court stated:

whenever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such

The California courts have found that both a hospital and a treating psychiatrist have a special relationship with a suicidal patient when they accept responsibility for the patient's care. In *Meier v. Ross General Hospital*,²² for example, a hospital agreed to care for a suicidal patient who later committed suicide while under the hospital's care.²³ Due to the special relationship with the patient, the court held that the hospital and the psychiatrist had a duty to prevent foreseeable suicide.²⁴ The California courts have also held that a psychiatrist had a duty to warn when it was likely that a client would injure a third person.²⁵ Without a legal duty, any injury is merely an injury without a legal wrong.²⁶

2. Clergy Malpractice as a Tort

Typically, the validity of clergy malpractice is discussed in relation to the clergyperson in the role of counselor.²⁷ It has, however, been applied more generally:

Malpractice is the term we must also apply to professional ministers of the gospel who violate their trust. Preachers who raise money for themselves and not the work, who use people instead of serve people, who lust for power and sex and status, and who use their platform to satisfy their greed violate the code of the spiritual elder²⁸

Regardless of how the term is applied, clergy malpractice implies that there is a standard of care within the ministry to which a clergyperson must adhere.²⁹

A standard for clergy counselors infers that anyone within a particular religion or denomination could counsel under that

danger.

Id. at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100 (quoting *Heaven v. Pender*, 11 Q.B.D. 503, 509 (1883)); see also RESTATEMENT (SECOND) OF TORTS § 315 (1965).

22. 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968).

23. *Id.* at 423-24, 445 P.2d at 522-23, 71 Cal. Rptr. at 906-07.

24. *Id.*

25. See *Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

26. 5 Witkin, *Summary of California Law* (Torts) § 6 (9th ed. 1988).

27. *Hester v. Barnett*, 723 S.W.2d 544, 551 (Mo. App. 1987); see also *infra* notes 35-52 and accompanying text.

28. Mitchell, *Disgraced Preachers: The Word is Malpractice*, FUNDAMENTALIST JOURNAL, June 1988, at 14.

29. See *supra* notes 14-18 and accompanying text.

standard.³⁰ Samuel E. Ericsson, director of the Christian Legal Society's Center for Law and Religious Freedom, doubts the ability of a court to define a standard of care because of its inability to separate the moral from the mental aspects of counseling.³¹ He believes that the issues raised in clergy counseling cases are religious, and not conducive to judicial review because of their inherent lack of objectivity.³² Conversely, Rabbi Ben Zion Bergman, Dean of Students and Senior Lecturer in Rabbinic Literature at the University of Judaism in Los Angeles, suggests that members of the clergy should be held to a well-defined standard of care when they function as counselors,³³ and that deviation from that standard should be deemed actionable malpractice.³⁴

B. *Other States*

Other states have been cautious in allowing an action for clergy malpractice in counseling. Typically, the courts have tended to avoid the issue. For example, *Hester v. Barnett*³⁵ involved a Baptist minister who allegedly defamed the plaintiffs, a husband and wife, by accusing them of physically and emotionally abusing their children.³⁶ The plaintiffs brought an action which alleged "Ministerial Malpractice, Alienation of Affections, Defamation of Character, Intentional Infliction of Emotional Distress, Invasion of Privacy, and Interference with Contract."³⁷ The lower court dismissed the action on all counts.³⁸ The Missouri court of appeals affirmed the dismissal of the ministerial

30. See generally Ericsson, *supra* note 6, at 171. See also Comment, *Lower Power*, *supra* note 6, at 150-61.

31. Ericsson, *supra* note 6, at 167-69. Interestingly, Samuel E. Ericsson was co-counsel for the defendants in *Nally*. He was also a member and an administrative pastor at Grace Community Church. See *Hauled Into Court: The New Trials of Ministry*, LEADERSHIP FORUM, Winter, 1985 at 127, 129, 136.

32. Ericsson, *supra* note 6, at 169.

33. Bergman, *supra* note 6, at 62-64; see also Comment, *Lower Power*, *supra* note 6, at 157-60 (the writer offers a practical solution to establishing a duty of care through a nonreligious process).

34. Bergman, *supra* note 6, at 57-61.

35. 723 S.W.2d 544 (Mo. App. 1987).

36. *Id.* at 550.

37. *Id.*

38. *Id.* at 549.

malpractice and intentional infliction of emotional distress counts, but reversed the dismissal of the other counts.³⁹ Writing for a unanimous court, Judge Shangler stated that a valid clergy malpractice action must address incidents of clergy/communicant relationships not already actionable.⁴⁰ The court stressed that malpractice was not a theory of ordinary negligence or intentional tort, because these were already actionable regardless of their professional color.⁴¹ Although the court acknowledged that a theory of clergy malpractice might unduly involve the court in church functions, it also inferred that such an action would be possible under different circumstances.⁴² Judge Shangler stated: "The viability of a clergy malpractice remedy for negligent counseling, nevertheless assumed, the petition brought by the Hesters as Count I [ministerial malpractice] does not allege the tort."⁴³

In *Handley v. Richards*,⁴⁴ the plaintiffs brought a wrongful death action which alleged clergy malpractice during counseling.⁴⁵ This case concerned a minister who became sexually involved with the wife of a couple he had been counseling for their marital difficulties.⁴⁶ The complaint alleged that the deceitful manner of counseling had contributed to the husband's eventual suicide.⁴⁷ The Alabama Supreme Court affirmed the trial court's order dismissing the plaintiff's petition for failure to state a cause of action.⁴⁸

In Ohio, a former husband brought a clergy malpractice action against a minister and a church after he learned that the minister had been sexually involved with his wife while counseling the couple for marital problems.⁴⁹ The Ohio Supreme Court held that an action for clergy malpractice was not viable under

39. *Id.* at 564.

40. *Id.* at 551.

41. *Id.*

42. *Id.* at 553.

43. *Id.*

44. 518 So. 2d 682 (Ala. 1987).

45. *Id.* at 683.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Strock v. Presnell*, 38 Ohio St. 3d 207, 208, 527 N.E.2d 1235, 1236 (1988).

the facts before the court.⁵⁰ The court found that the defendant's alleged acts fell under an intentional tort theory.⁵¹ Writing for the majority, Justice Wright stated that "[f]or clergy malpractice to be recognized, the cleric's behavior, even if it is related to his 'professional' duties, must fall outside the scope of other recognized torts."⁵²

C. *Constitutional Considerations*

1. *The First Amendment*

The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁵³ The fourteenth amendment makes the first amendment guarantees applicable to the states.⁵⁴

a. *The Free Exercise Clause*

The free exercise clause⁵⁵ embraces two concepts — the freedom to believe and the freedom to act. The freedom to believe is an absolute freedom. However, the freedom to act, in the interest of protecting society, is subject to governmental regulation.⁵⁶ With respect to the absolute freedom to believe, a court may not address the truth or falsity of an asserted religious belief.⁵⁷ It may only consider whether the belief, no matter how preposterous, is sincerely held by the individual.⁵⁸ Conversely, under the freedom to act concept, a court may impose liability when religious conduct poses a substantial threat to public

50. *Id.* at 212, 527 N.E.2d at 1239.

51. *Id.*

52. *Id.*

53. U.S. CONST. amend. I.

54. U.S. CONST. amend. XIV, § 1; *see also* *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (establishment clause made applicable to the states by the fourteenth amendment); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise clause made applicable to the states by the fourteenth amendment).

55. *See supra* notes 53-54 and accompanying text.

56. 310 U.S. at 303-04.

57. *See* *United States v. Ballard*, 322 U.S. 78, 87 (1944), *rev'd on other grounds*, 329 U.S. 187 (1946); *see also* *Ericsson*, *supra* note 6, at 176-79; Note, *Spiritual Counseling Conflicts*, *supra* note 6, at 426-29 (discussion of Justice Douglas' analysis in *Ballard*).

58. *United States v. Seeger*, 380 U.S. 163 (1965).

safety, peace or order.⁵⁹

To determine whether legislative action violates the free exercise clause, a two-pronged test is applied.⁶⁰ The first prong requires the person alleging the violation to show that the action is coercive because it operates to circumscribe the individual in his religious beliefs and practices.⁶¹ If the action is deemed coercive, the court then assesses whether there is a sufficiently compelling state interest to justify the burden on religion.⁶² If the state's interest is insufficient, the government action is unconstitutional.⁶³

b. *The Establishment Clause*

The establishment clause⁶⁴ mandates the separation of church and state. In *Everson v. Board of Education*,⁶⁵ the Supreme Court held that the clause means that no government may set up an official church, prefer one religion, force a belief in one religion, or participate in the affairs of religious organizations.⁶⁶ A three-part analysis was set forth in *Lemon v. Kurtzman*⁶⁷ to determine whether a governmental action is acceptable under the establishment clause. To be valid, the action must have a clear secular purpose, its primary effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion.⁶⁸

59. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

60. For a thorough analysis of the two-pronged free exercise test as applied to clergy malpractice, see Comment, *Whole Cloth*, *supra* note 6, at 534-42.

61. *Abington School Dist. v. Schempp*, 374 U.S. 203, 223 (1963).

62. *Sherbert*, 374 U.S. at 403; see also Comment, *Whole Cloth*, *supra* note 6, at 534-42.

63. *Sherbert*, 374 U.S. at 403.

64. See *supra* notes 53-54 and accompanying text.

65. 330 U.S. 1 (1947).

66. *Id.* at 15-16.

67. 403 U.S. 602 (1971).

68. *Id.* at 612-13. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court reaffirmed the *Lemon* test. However, in recent years the Court has adopted the modified *Lemon* test suggested in Justice O'Connor's concurrence in *Lynch*, which focuses on institutional entanglement and endorsement or disapproval of religion. 465 U.S. 668, 688 (1971). See, e.g., *County of Allegheny v. ACLU*, 109 S. Ct. 3086 (1989); *Texas Monthly v. Bullock*, 109 S. Ct. 890 (1989); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

2. *The First Amendment and Clergy Malpractice*

The California legislature has taken care to avoid violating first amendment principles by specifically excluding religion from certain laws. For example, the codified law dealing with the licensing of doctors states that the provisions shall not "regulate, prohibit, or apply to any other kind of treatment by prayer, nor interfere in any way with the practice of religion."⁶⁹ The codified law dealing with services provided by psychiatric personnel exempts services "when done by the tenets of any well-recognized church or denomination"⁷⁰ The law which regulates the licensing of marriage and family counselors states that "[t]his chapter shall not apply to any priest, rabbi or minister of the gospel of any religious denomination when performing counseling services as part of his or her pastoral or professional duties"⁷¹

With respect to counseling, Ericsson contends that, absent actual malice, the first amendment should bar clergy malpractice actions.⁷² He argues that pastoral counseling involves a spiritual realm which secular courts are ill-equipped and constitutionally unable to regulate.⁷³

Bergman, on the other hand, supports an action for clergy malpractice. In his view, only the purely sacerdotal functions of the clergy are protected from state regulation by virtue of the first amendment.⁷⁴ Bergman distinguishes the clergy's counseling function from the purely sacerdotal by describing the secularization of pastoral counseling and contends that a duty of care may be imposed without violating the first amendment.⁷⁵

Essential to the first amendment question is whether the realm of clergy counseling is deemed to be a purely religious function. A purely religious function is less likely to be regulated

69. CAL. BUS. & PROF. CODE § 2063 (Deering 1990).

70. *Id.* § 4508.

71. *Id.* § 4980.01.

72. Ericsson, *supra* note 6, at 167-69.

73. *Id.* at 171-72.

74. Bergman, *supra* note 6, at 57.

75. *Id.* at 58-59. See generally Note, *Spiritual Counseling Conflicts*, *supra* note 6; Comment, *Bad News For the Good Samaritan*, *supra* note 6. For a practical solution to establishing a duty of care through a nonreligious process see Comment, *Lower Power*, *supra* note 6, at 157-60.

by government action because of first amendment guarantees. If pastoral counseling is deemed to be a secularized, nonreligious function, governmental action may more readily pass constitutional review.⁷⁶ Some argue, however, that even as a religious function, pastoral counseling should be subject to governmental control.⁷⁷

D. *Tenets of Pastoral Counseling*

The tenets of pastoral counseling within Christianity⁷⁸ are no different from the tenets of the Sunday sermon. The words of counsel and the words of the sermon are based on the Bible, which is deemed by both counselor and preacher to be the Word of God.⁷⁹

The Bible teaches that Christians are fully competent and equipped to instruct and counsel one another.⁸⁰ Jay Adams, a prominent Christian counselor, believes that the Christian counselor is completely able to meet every counseling situation through the use of the Scriptures.⁸¹ In his opinion, the Scriptures should be the counselor's sole guide. Adams wrote that "qualified Christian counselors properly trained in the Scriptures are competent to counsel — more competent than psychi-

76. Commentators have suggested that the establishment clause may not apply to clergy counseling because they consider such counseling a nonreligious function. Some commentators who acknowledge that the free exercise clause may apply, contend that the state interest in the protection of life would be sufficiently compelling to outweigh any burden on the clergy counselor. See *supra* note 7 and accompanying text; see also Bergman, *supra* note 6, at 57-61.

77. See *supra* note 7 and accompanying text.

78. Although the emphasis of this Note is on Christian tenets because the defendants were Christians, the principles asserted herein are applicable to any sincerely held set of religious beliefs.

79. See generally J. ADAMS, *THE USE OF THE SCRIPTURES IN COUNSELING* (1975) [hereinafter J. ADAMS, *SCRIPTURES*]; J. ADAMS, *COMPETENT TO COUNSEL* (1970) [hereinafter J. ADAMS, *COMPETENT*]; L. CRABB, JR., *EFFECTIVE BIBLICAL COUNSELING* (1977).

80. The Apostle Paul wrote to the Christian church in Rome: "Personally I am satisfied about you, my brethren, that you yourselves are rich in goodness, amply filled with all [spiritual] knowledge and competent to admonish and counsel and instruct one another also." *Romans* 15:14 (Amplified New Testament). To Timothy, Paul wrote that "[a]ll Scripture is God-breathed and is useful for teaching, rebuking, correcting and training in righteousness, so that the man of God may be thoroughly equipped for every good work." 2 *Timothy* 3:16, 17 (New International).

81. J. ADAMS, *SCRIPTURES*, *supra* note 79, at 4-5.

atrists or anyone else."⁸² Adams is wholly opposed to referring counselees to secular psychiatrists, and only as an exception would he consider referring counselees to another competent Christian counselor.⁸³

Total reliance on the Scriptures and a reluctance to refer to mental health professionals are not characteristics of all Christian counselors. Some may be less confident in their ability to counsel and are, therefore, more apt to refer to others.⁸⁴ Dr. Lawrence Crabb, Jr., who served as Chairman of the Department of Counseling at Grace Theological Seminary, wrote that the only reliable authority in counseling is found in the Scriptures.⁸⁵ He also indicated, however, that psychology and psychotherapy could offer insights into human behavior which would in no way contradict the Scriptures and could even complement Christian counseling.⁸⁶

Some have suggested that mental health professionals should be trained in referring people to clergy.⁸⁷ "[W]hen issues of basic value commitments to religious and quasi-religious positions are involved or when actions are evaluated in terms thereof . . . [t]here is a valid concern that the psychologist and other mental health professionals need explicit training in recognizing these problems and referring them to clergy."⁸⁸

82. J. ADAMS, *COMPETENT*, *supra* note 79, at 18.

83. *Id.*

84. See, e.g., Alcorn, *Pastor - Teacher or Super - Counselor?*, 6 LEADERSHIP FORUM 131 (1985). The writer referred to himself as a pastor in psychologist's clothing, and indicated that he had referred people to lay counselors. *Id.* at 135. A study of 127 male clergy from ten Protestant denominations concluded in part: "Overall, this study confirmed that, as in previous research, the clergy spend a significant amount of time counseling a wide variety of problems and they also refer a variety of clients, primarily to mental health professionals." Winger and Hunsberger, *Clergy Counseling Practices, Christian Orthodoxy and Problem Solving Styles*, 16 J. PSYCHOLOGY AND THEOLOGY 41, 47 (1988).

85. L. CRABB JR., *supra* note 79, at 15.

86. *Id.*

87. See Gorsuch and Meylin, *Toward a Co-Professional Model of Clergy-Psychologist Referral*, 7 J. PSYCHOLOGY AND CHRISTIANITY 3, 23-31 (1988). The authors stated that there are clients with religious concerns who would "have difficulty in communicating their source of distress to psychologists." *Id.* at 30.

88. *Id.* at 23.

E. Suicide Prevention

In the United States today, suicide is the third leading cause of death among young people between the ages of fifteen and twenty-four years.⁸⁹ While the overall rate of suicide for other age groups has slightly declined, the suicide rate for young people has risen seventy-two percent since 1968.⁹⁰ Each day in this nation, fourteen young people will kill themselves and an estimated 700 will attempt suicide.⁹¹

Suicide prevention involves both immediate crisis intervention and long-term secondary intervention.⁹² Recent legislation reflects a growing awareness and concern for intervention into suicidal behavior. For example, California has enacted legislation to develop a five-year youth suicide prevention program to gather research and develop a training program involving students, parents, teachers, school administrators, mental health professionals, local social service agencies, juvenile justice representatives, and others concerned with the problem of youth suicide.⁹³ Illinois has passed similar legislation.⁹⁴ California's legislation regulating Community Mental Health Services includes suicide prevention under its definition of crisis intervention,⁹⁵ and provisions for emergency telephone systems include suicide prevention services.⁹⁶

New Jersey,⁹⁷ Wisconsin,⁹⁸ and Maryland⁹⁹ have enacted legislation to establish youth suicide prevention programs in the schools. Rhode Island has established a system which incorporates suicide prevention into existing health education pro-

89. G. EVANS & N. FARBEROW, *THE ENCYCLOPEDIA OF SUICIDE* 5 (1988).

90. D. CURRAN, *ADOLESCENT SUICIDAL BEHAVIOR* 14-15 (1987).

91. G. EVANS & N. FARBEROW, *supra* note 89, at 5; *see also* D. CURRAN, *supra* note 90, at 15, where the author cites attempted versus actual suicide rates as high as 312:1.

92. *See generally* D. CURRAN, *supra* note 90, at 177-78; G. EVANS & N. FARBEROW, *supra* note 89, at 171-73; D. EVERSTINE & L. EVERSTINE, *PEOPLE IN CRISIS: STRATEGIC THERAPEUTIC INTERVENTIONS* 31 (1983); J. ZUSMAN & D. DAVIDSON, *ORGANIZING THE COMMUNITY TO PREVENT SUICIDE* 20 (1971).

93. CAL. WELF. & INST. CODE § 5698 (Deering 1989).

94. ILL. ANN. STAT. ch. 91 ½, para. 100-58 (Smith-Hurd 1990).

95. CAL. WELF. & INST. CODE § 5008 (Deering 1990).

96. CAL. GOV'T. CODE § 53110 (Deering 1990).

97. N.J. REV. STAT. § 30:9A-12 (1987).

98. WIS. STAT. § 115.365 (1987-88).

99. MD. EDUC. CODE ANN. § 7-4A-01 (1989).

grams.¹⁰⁰ This program requires public school teachers, designated to teach suicide prevention, to attend workshops provided by Samaritan, Incorporated.¹⁰¹ The Texas legislature has created the position of Youth Suicide Prevention Officer, appointed by the Department of Mental Health and Mental Retardation, to serve as a liaison to the public schools.¹⁰² Connecticut has created an advisory board on youth suicide prevention which includes, among others, a psychiatrist, a psychologist, a board of education representative, a high school student, a high school faculty member, a college student and a college faculty member.¹⁰³

New York has established an adolescent suicide prevention program which specifically addresses educating the clergy. This program provides grants "to public or private not-for-profit organizations, or public or private schools, acting alone or in concert with others, in order to educate the general population, and in particular parents, teachers, clergy, health and mental health professionals and adolescents themselves"¹⁰⁴

A National Committee on Youth Suicide Prevention was established and incorporated in 1985.¹⁰⁵ Its primary purpose is to reduce the number of actual and attempted suicides through public awareness and prevention programs.¹⁰⁶ There are currently more than 250 suicide prevention centers in the United States.¹⁰⁷ Most of them operate twenty-four hour crisis hotlines and rely heavily on trained lay volunteers to provide essential person-to-person services.¹⁰⁸ Volunteer training includes how to recognize suicidal tendencies and encourages direct questions re-

100. R.I. GEN. LAWS § 16-22-14.

101. The Samaritans, founded in England in 1953, is an international suicide prevention organization. It is a nonprofessional, nonreligious agency which offers a listening ear rather than counseling. They rarely refer to mental health professionals. See G. EVANS & N. FARBEROW, *supra* note 89, at 242; D. FRANCIS, SUICIDE 111-12 (1989).

102. TEX. REV. CIV. STAT. ANN. art. 5547-9A (Vernon 1990).

103. 1989 CONN. LEGIS. SERV. 89-191 (West).

104. N.Y. MENTAL HYG. LAW § 41.49 (McKinney 1990).

105. D. FRANCIS, *supra* note 101, at 112.

106. *Id.*

107. G. EVANS & N. FARBEROW, *supra* note 89, at 56. Recognized standards for certification of crisis intervention centers throughout the United States and Canada have been developed by the American Association of Suicidology. *Id.* at 12.

108. *Id.* at 242-43, 270; see also, D. FRANCIS, *supra* note 101, at 103-15; D. CURRAN, *supra* note 90, at 177-90.

garding a person's intent to commit suicide.¹⁰⁹

III. *Nally v. Grace Community Church of the Valley*

A. *The Facts*

On April 1, 1979, twenty-four year old Kenneth Nally committed suicide by a self-inflicted shotgun wound to the head. The following year, his parents filed a wrongful death action against Grace Community Church of the Valley, and four Church pastors: MacArthur, Thompson, Cory, and Rea.¹¹⁰

Kenneth Nally had been raised a Roman Catholic, but he converted to Protestantism while attending the University of California Los Angeles (UCLA).¹¹¹ His conversion caused friction within his family.¹¹² He began attending Grace Church in 1974 and until 1979, was active in various church ministries.¹¹³

In 1975, Nally saw a secular psychologist about problems he was having with his girlfriend.¹¹⁴ During this time, he also established a friendship with defendant Pastor Cory with whom he informally discussed his problems.¹¹⁵ In 1978, Nally began a "discipling relationship" with Pastor Rea with whom he also discussed his personal problems.¹¹⁶ Nally and Rea had only five "discipling" sessions.¹¹⁷ Until the spring of 1979, those five sessions and his informal meetings with Cory were the only counseling sessions that Nally had with the defendants.¹¹⁸

In February of 1979, Nally's mother arranged for him to see

109. See G. EVANS & N. FARBEROW, *supra* note 89, at 58-59; D. EVERSTINE & L. EVERSTINE, *supra* note 92, at 214. The authors reflect on how regrettable it is that some people are in therapy for years before they are asked if they have ever thought of killing themselves. "Do not presume that a client has no thought of suicide; when in doubt, ask; the earlier in treatment this question is asked, the better the client will be served." D. EVERSTINE & L. EVERSTINE, *supra* note 92, at 215.

110. *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, 283, 763 P.2d 948, 949, 253 Cal. Rptr. 97, 99 (1988), *cert. denied*, 109 S. Ct. 1644 (1989).

111. *Id.* at 284, 763 P.2d at 950, 253 Cal. Rptr. at 99.

112. *Id.*

113. *Id.*

114. *Id.* at 284, 763 P.2d at 950, 253 Cal. Rptr. at 100.

115. *Id.* at 284, 763 P.2d at 950, 253 Cal. Rptr. at 99.

116. *Id.* at 284, 763 P.2d at 950, 253 Cal. Rptr. at 100. "Discipling relationships were set up by Grace church to assist young Christians with problems and questions they might encounter in their lives as Christians.

117. *Id.*

118. *Id.*

a medical doctor, who prescribed an anti-depressant.¹¹⁹ Later that month, Nally saw another physician who suggested that he undergo a full physical examination.¹²⁰ Neither doctor referred Nally to a psychiatrist.¹²¹ At this time, Nally spoke about his problems to Pastor Thomson at an unscheduled counseling session during which he stated that he had considered suicide while a student at UCLA.¹²²

On March 11, 1979, Nally attempted suicide by taking an overdose of anti-depressants and, on the following day, he separately told Pastors MacArthur and Rea that he was sorry he had not succeeded.¹²³ During his hospital stay a psychiatrist recommended that Nally commit himself, but he refused and left the hospital on March 17, 1979.¹²⁴ He then stayed with Pastor MacArthur for several days.¹²⁵ MacArthur encouraged Nally to keep his appointments with the hospital psychiatrist and he also set up an appointment for Nally to see a doctor who was a deacon at Grace Church.¹²⁶ The deacon advised Nally to commit himself to a psychiatric hospital — but Nally again refused.¹²⁷ Between March 21 and March 31, 1979, Nally spoke with Pastor Thomson, two physicians, and a psychologist. He also visited a psychological clinic to discuss possible therapy.¹²⁸ On April 1, 1979, Nally went to a friend's apartment and shot himself in the head with a shotgun.¹²⁹

B. Lower Court Decisions

In March of 1980, Kenneth Nally's parents filed a three count wrongful death action in the superior court of Los Angeles, alleging clergyman malpractice, negligence, and outrageous conduct.¹³⁰ The superior court granted the defendants' motion

119. *Id.* at 285, 763 P.2d at 951, 253 Cal. Rptr. at 100.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 286, 763 P.2d at 951, 253 Cal. Rptr. at 101.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 287, 763 P.2d at 952, 253 Cal. Rptr. at 101.

129. *Id.* at 287, 763 P.2d at 952, 253 Cal. Rptr. at 102.

130. *Nally v. Grace Community Church of the Valley*, No. NCC 18668-B (L.A.

for summary judgment.¹³¹ The case then went to the California court of appeal, and in *Nally v. Grace Community Church of the Valley*¹³² (*Nally I*), the court reversed the superior court in a two-to-one decision.¹³³ The *Nally I* majority held that a cause of action for wrongful death, arising out of intentional infliction of emotional distress, had been adequately pled.¹³⁴ The court did not address clergy malpractice, negligence, or whether the defendants had a duty to refer Nally to mental health professionals.¹³⁵ Dissenting Justice Hanson concluded that there were no triable issues of fact under any theory, including intentional infliction of emotional distress.¹³⁶ The Supreme Court of California denied a hearing and depublished the court of appeal's *Nally I* decision.¹³⁷

On remand, the superior court entered a nonsuit, stating that "[t]here is no compelling state interest to climb the wall of separation of church [and state] and plunge into the pit on the other side that certainly has no bottom."¹³⁸ The case went back to the court of appeal, and was again reversed and remanded in *Nally v. Grace Community Church of the Valley*¹³⁹ (*Nally II*),

County Super. Ct., filed Mar. 31, 1980), *rev'd and remanded*, 204 Cal. Rptr. 303 (opinion deleted from official reporter by California Supreme Court, see 157 Cal. App. 3d 912 (1984)), *dismissed on motion for nonsuit at trial*, No. NCC 18668-B (L.A. County Super. Ct., filed May 24, 1985), *judgment granting nonsuit rev'd*, 240 Cal. Rptr. 215 (1987) (review granted for California Supreme Court opinion, not printed in official reporter, see 194 Cal. App. 3d 1147 (1987)), *rev'd*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (1989).

131. *Id.*

132. 204 Cal. Rptr. 303 (1984) (depublished opinion deleted from official reporter by California Supreme Court, see 157 Cal. App. 3d 912 (1984)), *dismissed on motion for nonsuit at trial*, No. NCC 18668-B (L.A. County Super. Ct., filed May 24, 1985), *judgment granting nonsuit rev'd*, 240 Cal. Rptr. 215 (1987) (review granted for supreme court opinion, not printed in official reporter, see 194 Cal. App. 3d 1147 (1987)), *rev'd*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (1989).

133. *Id.* at 309.

134. *Id.* at 307.

135. *Id.* at 309.

136. *Id.* at 321 (Hanson, J., dissenting).

137. *Id.* at 303.

138. See *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, 289, 763 P.2d 948, 954, 253 Cal. Rptr. 97, 103 (1988), (quoting *Nally v. Grace Community Church of the Valley*, No. NCC 18668-B (L.A. County Super. Ct., filed Mar. 31, 1980)), *cert. denied*, 109 S. Ct. 1644 (1989).

139. 240 Cal. Rptr. 215 (1987) (review granted for California Supreme Court opinion, not printed in official reporter, see 194 Cal. App. 3d 1147 (1987)), *rev'd*, 47 Cal. 3d

another two-to-one decision.¹⁴⁰ The *Nally II* court combined the clergy malpractice and negligence counts to create a cause of action for negligent failure to prevent suicide and held that the nontherapist counselor, both religious and secular, had a duty to refer suicidal persons to mental health professionals.¹⁴¹ The *Nally II* court discussed the first amendment issues raised by imposing such a duty.¹⁴²

Associate Justice Johnson, speaking for the majority, stated that holding pastoral counselors to the same standard as secular counselors neither tended to establish nor to promote religion, and therefore did not violate the establishment clause.¹⁴³ The court afforded the free exercise clause much more discussion, but ultimately held that the state's compelling interest in suicide prevention was served by imposing upon pastoral counselors a duty to refer.¹⁴⁴ Justice Johnson stated that there was no direct burden on religious expression,¹⁴⁵ and that the first amendment would not be offended even if the duty were imposed on a religious counselor who had a religious belief that suicidal individuals should not be referred to mental health professionals.¹⁴⁶

In his dissenting opinion, Justice Cole stated that "[e]ntirely apart from any other reasons why the majority incorrectly holds that potential liability can exist on the part of defendants, familiar first amendment principles clearly stand in the way of liability."¹⁴⁷ Justice Cole criticized the majority for rejecting Pastor Thomson's testimony that the Bible gives the root answers to why emotional or psychiatric problems exist.¹⁴⁸ He asserted that the majority had violated the principle set forth in *United States v. Ballard*,¹⁴⁹ that a court may not ad-

278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), cert. denied, 109 S. Ct. 1644 (1989).

140. *Id.* at 243.

141. *Id.* at 219.

142. *Id.* at 230-37; see *supra* notes 53-77 and accompanying text.

143. *Nally*, 240 Cal. Rptr. at 230-31.

144. *Id.* at 235.

145. *Id.*

146. *Id.* at 237.

147. *Id.* at 244 (Cole, J., dissenting).

148. *Id.* at 245 (Cole, J., dissenting); see also *supra* notes 78-88 and accompanying text.

149. 322 U.S. 78 (1944), *rev'd on other grounds*, 329 U.S. 187 (1940).

dress the truth or falsity of a religious belief.¹⁵⁰

C. *The California Supreme Court*

1. *The Majority Opinion*

In *Nally v. Grace Community Church of the Valley*¹⁵¹ (*Nally III*), the Supreme Court of California reversed *Nally II* without addressing the first amendment issues.¹⁵² The *Nally III* court based its opinion on a tort analysis holding that the plaintiffs had failed to meet the threshold requirements for imposing on the defendants a duty to prevent suicide.¹⁵³ The court further held that there was no special relationship¹⁵⁴ between *Nally* and the defendants, and that there was no legal duty to refer.¹⁵⁵ The court also discussed foreseeability and causation¹⁵⁶ in relation to imposing a duty of care, and found that these necessary elements of a tort cause of action were missing.¹⁵⁷ Holding that the superior court had properly granted a nonsuit in all causes of action,¹⁵⁸ Chief Justice Lucas, writing for the majority, expressly stated that there was no need to address the constitutional issues posed by the defendants.¹⁵⁹

2. *The Concurring Opinion*

In his concurring opinion, Justice Kaufman strongly disagreed with the majority's conclusion that the defendants owed no duty of care.¹⁶⁰ Justice Kaufman concluded that the defendants had a duty to recognize their own limitations in counseling a suicidal person and to refer that person to a mental health

150. *Nally*, 240 Cal. Rptr. at 245; see also *supra* notes 53-63 and accompanying text.

151. 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), cert. denied, 109 S. Ct. 1644 (1989).

152. *Id.* at 291, 763 P.2d at 955, 253 Cal. Rptr. at 104.

153. *Id.* at 299, 763 P.2d at 960, 253 Cal. Rptr. at 109.

154. See *supra* notes 19-26 and accompanying text.

155. *Nally*, 47 Cal. 3d at 296, 763 P.2d at 958, 253 Cal. Rptr. at 107.

156. See W. PROSSER & R. KEETON, PROSSER AND KEETON ON TORTS §§ 41-44 (5th ed. 1984).

157. *Nally*, 47 Cal. 3d at 296-97, 763 P.2d at 958-59, 253 Cal. Rptr. at 107-08.

158. *Id.* at 304, 763 P.2d at 964, 253 Cal. Rptr. at 113.

159. *Id.* at 291, 763 P.2d at 955, 253 Cal. Rptr. at 104.

160. *Id.* at 304, 763 P.2d at 964, 253 Cal. Rptr. at 113 (Kaufman, J., concurring).

professional.¹⁶¹ Justice Kaufman further indicated that this duty was "religiously neutral," and that the corresponding compelling state interest in preserving the life of a would-be suicidal person would override any first amendment challenge.¹⁶² Justice Kaufman, joined by Justice Broussard, concurred with the majority only because he believed that the defendants neither breached their duty to refer, nor contributed causally to Nally's suicide.¹⁶³

IV. Analysis

The final determination on clergy malpractice in *Nally v. Grace Community Church of the Valley*,¹⁶⁴ was based on a tort analysis.¹⁶⁵ Although considerable commentary was available on the first amendment issues raised under a theory of clergy malpractice,¹⁶⁶ the California Supreme Court never addressed those issues in *Nally v. Grace Community Church of the Valley* (*Nally III*).¹⁶⁷ In a well-reasoned analysis, the *Nally III* court found that the tort essentials of a special relationship and a legal duty were lacking.¹⁶⁸ Nevertheless, implicit in the *Nally III* court's statement that the plaintiffs failed to meet the "threshold requirements"¹⁶⁹ for a duty to refer, lies the inescapable conclusion that a clergy malpractice action is viable if those requirements are met. Within those requirements there has to be a

161. *Id.* at 309-10, 763 P.2d at 967, 253 Cal. Rptr. at 116.

162. *Id.* at 313, 763 P.2d at 970, 253 Cal. Rptr. at 119.

163. *Id.* at 314, 763 P.2d at 970, 253 Cal. Rptr. at 119.

164. No. NCC 18668-B (L.A. County Super. Ct., filed Mar. 31, 1980), *rev'd and remanded*, 204 Cal. Rptr. 303 (opinion deleted from official reporter by California Supreme Court, *see* 157 Cal. App. 3d 912 (1984)), *dismissed on motion for nonsuit at trial*, No. NCC 18668-B (L.A. County Super. Ct., filed May 24, 1985), *judgment granting nonsuit rev'd*, 240 Cal. Rptr. 215 (1987) (review granted for California Supreme Court opinion, not printed in official reporter, *see* 194 Cal. App. 3d 1147 (1987)), *rev'd*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (1989).

165. *Nally*, 47 Cal. 3d at 291-300, 763 P.2d at 955-61, 253 Cal. Rptr. at 104-10; *see supra* notes 151-63 and accompanying text.

166. *See, e.g., Nally v. Grace Community Church of the Valley*, 240 Cal. Rptr. 215, 230-37 (1987) (review granted for California Supreme Court opinion, not printed in official reporter, *see* 194 Cal. App. 3d 1147 (1987)), *rev'd*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert denied*, 109 S. Ct. 1644 (1989); *see also supra* note 6 and accompanying text.

167. *Nally*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97.

168. *Id.* at 291-300, 763 P.2d at 955-61, 253 Cal. Rptr. at 104-10; *see also supra* notes 19-26, 151-59 and accompanying text.

169. *Id.* at 299, 763 P.2d at 960, 253 Cal. Rptr. at 109.

legal duty to refer suicidal counselees.¹⁷⁰ The California legislature could create a legal duty by mandating that pastoral counselors refer suicidal counselees to mental health professionals.¹⁷¹ Then, the threshold requirements for a duty to refer would, arguably, be satisfied, making such an action viable.

In an equally well reasoned tort analysis, concurring Justice Kaufman reasoned that there was a special relationship between Nally and the defendants, and that there was a legal duty to refer, but that this legal duty had been satisfied by the defendants.¹⁷² Justice Kaufman summarily dismissed the constitutional questions, stating that there was no merit to the contention that imposing a duty to refer on the defendants would burden their first amendment right to the free exercise of religion.¹⁷³

A. *The First Amendment and Clergy Malpractice in Pastoral Counseling*

Nally II was the only *Nally* case in which the first amendment issues relating to clergy malpractice in pastoral counseling were addressed.¹⁷⁴ Nevertheless, the majority's statement that the imposition of a duty to refer placed no direct burden on religious expression reflects the court's misunderstanding of the purely religious nature of pastoral counseling.¹⁷⁵ There are Christian counselors who sincerely believe that it is unbiblical to refer their counselees to mental health professionals.¹⁷⁶ These

170. See *supra* notes 19-26 and accompanying text.

171. In *Nally II*, dissenting Justice Cole suggested that it was the legislature's role to enact policy on clergy malpractice. *Nally v. Grace Community Church of the Valley*, 240 Cal. Rptr. 215, 243 (Cole, J., dissenting) (review granted for California Supreme Court opinion, not printed in official reporter, see 194 Cal. App. 3d 1147 (1987), *rev'd*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (1989). See also Note, *A New Problem for Religious Organizations*, *supra* note 6, at 394-96 (author suggests that state legislatures take steps to establish guidelines on clergy malpractice).

172. *Nally*, 47 Cal. 3d 309-11, 763 P.2d at 967-68, 253 Cal. Rptr. at 116-17; see also *supra* notes 160-63 and accompanying text.

173. *Nally*, 47 Cal. 3d at 312, 763 P.2d at 969, 253 Cal. Rptr. at 118.

174. *Nally*, 240 Cal. Rptr. 215.

175. *Id.* at 235; see also *supra* notes 78-88 and accompanying text.

176. Justice Cole acknowledged this in his dissent and criticized the majority: "It [the *Nally II* court] seemingly rejects his [Pastor Thomson's] testimony that the Bible gives the root answer to why emotional or psychiatric problems exist In effect, the majority has found one set of views to be false or not adequate, something which it may

counselors could not practice this belief if they were forced to refer counselees.¹⁷⁷ Any imposition of such a duty to refer would, therefore, fail under the two-pronged test of the free exercise clause of the first amendment. The first prong would be violated because the Christian counselor would be forced to act in opposition to a sincerely held religious belief.¹⁷⁸ The state would then have to demonstrate, under the second prong of the test, that a compelling state interest justified placing this burden on the counselor.¹⁷⁹ This would require a showing that the burdened activity (pastoral counseling without referral) posed a substantial threat to public safety, peace, and order.¹⁸⁰ Because mental health professionals themselves do not recommend simple referral, it would be difficult to show that a pastor's failure to refer posed a threat to public safety, peace, and order.¹⁸¹ Furthermore, there is no evidence that pastoral counselors are any less effective than mental health professionals in preventing suicide.¹⁸²

Imposing a duty on pastoral counselors to refer to mental health professionals would also violate the establishment clause of the first amendment.¹⁸³ To be valid under the establishment clause, the state action would have to pass the *Lemon* test. This test requires that the action have a clear secular purpose, that it neither advance nor inhibit religion, and that it avoid excessive government entanglement with religion.¹⁸⁴ Although a pastoral

not do." *Nally*, 240 Cal. Rptr. 215, 245 (Cole, J., dissenting); see also *supra* notes 78-88 and accompanying text.

177. But in *Nally II*, the majority said that "none of the legal responsibilities recognized in this opinion prohibit the Church's counselors from relying on religious doctrine to deal with the counselees' mental disorders and emotional problems." *Nally*, 240 Cal. Rptr. at 236.

178. See *supra* notes 53-63 and accompanying text.

179. See *supra* notes 53-63 and accompanying text.

180. See *supra* note 59 and accompanying text. For a thorough analysis of the free exercise clause and the establishment clause as applied to clergy malpractice in pastoral counseling see Comment, *Whole Cloth*, *supra* note 6, at 525-43.

181. See *infra* notes 200-10 and accompanying text.

182. According to Adams the suicide rate among psychiatrists is higher than among other groups in the medical profession. J. ADAMS, COMPETENT, *supra* note 79, at 21 n.3.

183. See *supra* notes 64-68; see also Comment, *Whole Cloth*, *supra* note 6, at 525-43.

184. *Lemon v. Kurtzman*, 403 U.S. 602, 610 (1971); see also *supra* notes 64-68 and accompanying text.

counselor would be forced to act in opposition to the religious belief that it is unbiblical to refer counselees to mental health professionals, the action would have an arguably secular purpose of protecting suicidal counselees.¹⁸⁵ The primary effect of the action, however, would be to express disapproval and to inhibit the practice of a religion which teaches that the Bible is the only source necessary for effective counseling.¹⁸⁶ Furthermore, because the government would be forcing a counselor to act outside his religious beliefs, there would be excessive government entanglement.¹⁸⁷

Defendant Pastor Thomson testified that because of his religious beliefs, he would not refer a counselee to a mental health professional whose viewpoint was inconsistent with the Bible.¹⁸⁸ Forcing Pastor Thomson, or any counselor who has similar beliefs, to refer counselees to mental health professionals would directly impinge upon their religious beliefs.¹⁸⁹

The facts before the *Nally III* court clearly supported a finding of first amendment violations. The *Nally II* court had imposed a duty to refer¹⁹⁰ — a duty which would have forced a defendant pastor to act in opposition to his sincerely held religious belief that it is unbiblical to refer. There is no evidence that pastoral counseling without referral poses a substantial threat to the public.¹⁹¹ The duty which the court imposed was, therefore, unconstitutional. The *Nally III* court, however, effectively avoided the paramount issue of constitutionality by focusing on a tort analysis.¹⁹²

185. See *supra* notes 64-68 and accompanying text.

186. See *supra* notes 64-68 and 78-88 and accompanying text.

187. See *supra* notes 64-68; see also Comment, *Whole Cloth*, *supra* note 6, at 525-34 (the author argues that imposing a duty to refer would be unconstitutional under the first amendment). But see Bergman, *Is the Cloth Unraveling?*, *supra* note 6, at 47 (the author contends that imposing such a duty does not violate the Constitution).

188. *Nally v. Grace Community Church of the Valley*, 240 Cal. Rptr. 215, 245 (1987), *rev'd*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (1989).

189. *Id.* See *supra* notes 78-88 and accompanying text.

190. *Nally*, 240 Cal. Rptr. at 219.

191. See *infra* notes 200-17 and accompanying text.

192. See *supra* notes 151-59 and accompanying text.

B. Referral and Suicide Prevention

If the *Nally III* majority had overruled the lower court on constitutional grounds, the California legislature would have been foreclosed from imposing a statutory duty to refer.¹⁹³ Because the court did not rule on constitutional grounds, the legislature is free to take steps to make clergy malpractice a more viable cause of action.¹⁹⁴ Any such legislation would have to withstand a constitutional challenge. Given the varying convictions, opinions, and conclusions of courts and commentators, it would be difficult to predict the outcome of such a challenge.¹⁹⁵

The questions of referral and who is best able to assist a troubled individual are perhaps most critical when they involve a potential suicide. Justice Johnson, speaking for the majority in *Nally II*, stated that pastoral counselors should refer suicidal counselees to those authorized to administer medication and initiate involuntary hospitalization.¹⁹⁶ In *Nally III*, Justice Kaufman, in his concurrence, advocated that pastoral counselors refer suicidal counselees to competent professional medical care.¹⁹⁷ Within a duty to refer to "others" is an underlying assumption that those others are more able than the religious counselor to prevent suicide.¹⁹⁸ This assumption is inconsistent not only with religious beliefs, but also with contemporary professional beliefs.¹⁹⁹

The world of psychiatry does not profess that all potential suicides should simply be referred for professional treatment. The trend among professionals today is toward training the non-professional to recognize and to deter, not just refer, the suicidal

193. See *supra* notes 151-59 and accompanying text. In *Nally II*, the majority emphasized that it did not foreclose the legislature from future action on clergy malpractice. 240 Cal. Rptr. 215, 242.

194. See *supra* note 166 and accompanying text.

195. See *supra* notes 6-9 and accompanying text.

196. *Nally*, 240 Cal. Rptr. at 219.

197. *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, 310, 763 P.2d 948, 967, 253 Cal. Rptr. 97, 116 (1988) (Kaufman, J., concurring), *cert. denied*, 109 S. Ct. 1644 (1989).

198. In *Nally II*, the court stated: "The only way the public can guarantee the former [clergy's counselees] will have as good a chance of surviving as the latter [mental health professional's counselee] is if pastoral counselors have the same legal duty to take care that their counselees not kill themselves." 240 Cal. Rptr. at 235.

199. See *supra* notes 78-88 and accompanying text.

individual.²⁰⁰ The role of psychiatrists and professional practitioners increasingly has become that of a consultant to the community based programs of interrelated services geared toward suicide prevention.²⁰¹ Mental health professionals recognize that nonprofessional volunteers are an integral part of any suicide prevention program.²⁰²

Supervised peer counseling has likewise been encouraged as a possible treatment method for suicidal adolescents.²⁰³ While mental health professionals have been shown to hold negative attitudes toward those who attempt suicide,²⁰⁴ research suggests that adolescents who have attempted suicide have a positive attitude toward suicidal peers.²⁰⁵ Author, D. Curran stated that "[p]eer counseling, in the form of professionally led groups of teenage suicide attempters may be a modality offering a high likelihood of providing the attempter with the support, help and attention they often seek, while at the same time dealing with some of the issues underlying the behavior."²⁰⁶

The very suggestion of referral may actually worsen a crisis by implying rejection and disapproval on the part of the one person in whom the suicidal individual may have confided.²⁰⁷ Research indicates that thirty-seven percent of adolescents referred for counseling fail to comply.²⁰⁸ Professional help may not be the best answer for suicidal adolescents.²⁰⁹ Rather, they may

200. "[P]rimary prevention refers to community wide programs which would seek to address the root causes of adolescent suicide and depression by involving the family and all other community based sources of potential support for adolescents." D. CURRAN, *supra* note 90, at 178.

201. See J. ZUSMAN & D. DAVIDSON, *supra* note 92, at 59-73. The authors give an overview of the development of "We Care," a community-based suicide prevention program, which incorporates the services of nonprofessional volunteers and professional consultants. *Id.*

202. See *supra* notes 105-09 and accompanying text.

203. See D. CURRAN, *supra* note 90, at 159.

204. *Id.* at 84-85.

205. *Id.* at 159, 189 (Colorado students who had been involved in a suicide prevention program indicated that they would be more comfortable and more willing to intervene to prevent suicide); see also Morrison, *Youth Suicide: An Intervention Strategy*, 32 Soc. WORK 537 (1987).

206. D. CURRAN, *supra* note 90, at 159.

207. *Id.* at 143-44.

208. *Id.* at 83-84.

209. *Id.* at 85.

just need someone to be there and to understand.²¹⁰

C. *Communication Between the Secular and Nonsecular Counselor*

During the eight years that *Nally* was decided, an estimated 40,000 young people in the United States killed themselves.²¹¹ The California courts heard arguments regarding a method of prevention which, even if constitutional, would probably be ineffective in preventing suicide in California or anywhere else in America.²¹²

Recent legislation, much of which focuses on schools, more adequately reflects the current mode of suicide prevention methods.²¹³ Schools are not required to refer suicidal students to mental health professionals. Instead, they are directed to establish prevention programs within the schools and to train teachers and students in suicide prevention.²¹⁴ The goal of the legislation mirrors the goal of prevention programs — to combine the efforts and abilities of the professional and nonprofessional community in an attempt to save lives.²¹⁵

The clergy are a part of this effort. Many of the volunteers who work on the suicide hotlines are members of the clergy.²¹⁶ A number of prevention centers, nonreligious and religious, were started by clergy members.²¹⁷

210. See *supra* notes 200-08 and accompanying text. "Many self-inflicted deaths might be prevented if people were trained to recognize the warning signals. Mental health specialists estimate that all potential suicides give at least one warning, and that 80% of them give repeated warnings." D. FRANCIS, *supra* note 101, at 52.

211. G. EVANS & N. FARBEROW, *supra* note 89, at 5; see also *supra* notes 90-91 and accompanying text.

212. See *supra* notes 193-210 and accompanying text.

213. See *supra* notes 93-109 and accompanying text.

214. See *supra* notes 93-109 and accompanying text.

215. See *supra* notes 93-109 and accompanying text.

216. Rescue Incorporated, a nondenominational agency based in Boston, Massachusetts, uses the volunteer services of over seventy clergypersons.

For the person who is threatening or trying to kill himself or herself, the various suicide prevention and crisis center organizations extend life-saving assistance, loving care, compassion and support. Every degree of teamwork must be employed by such organizations, the professional staff, the significant volunteers, the clergy, the police, the firemen and women

G. EVANS & N. FARBEROW, *supra* note 89, at 58.

217. Centers started by clergy people include Save-a-Life League, Samaritans, Rescue Inc., and Contact Teleministries USA. *Id.* at 56-58.

The paramount concern of both secular and nonsecular counselors involved in suicide prevention programs is the prevention of suicide. These two groups should combine their efforts to better understand both the practical and the theological aspects of a suicidal individual's struggle.²¹⁸ The premise that the secular and nonsecular worlds could learn from one another is not new. Noted secular psychologist, O. Howard Mowrer, suggests that the answer to the unrest in many persons' lives can be found in religion.²¹⁹ Mowrer also believes, however, that the church has lost its ability to minister to psychological and social needs because of its reliance on purely secular theory.²²⁰ Others have suggested that psychiatry has failed to treat psychological and social needs because of psychiatry's spiritual ignorance.²²¹

The spiritual, psychological, and social aspects of suicide will be better understood, and the counselee will be better served, when there is greater communication among those involved in suicide prevention.²²² Secular and nonsecular counselors may find that their underlying theories of treatment some-

218. See *infra* notes 222-27 and accompanying text; see also FRANCIS, *supra* note 101, at 103-05. After one successful and a number of attempted suicides in Glastonbury, Connecticut, local churches and community groups prepared a suicide prevention presentation. To understand their own feelings on suicide, they studied reference materials and pertinent Bible passages. "The goal was not to reach a consensus of opinion on suicide but simply to address a difficult theological issue that many people avoid until they are faced with a crisis." *Id.* at 104. The subject of suicide was then addressed in schools and in churches. Informational brochures were distributed, and people were invited to attend a performance of a play on suicide, followed by group discussions. *Id.* at 103-05; see also G. EVANS & N. FARBEROW, *supra* note 89, at 56 ("The potential suicide will often confide in a clergyman or woman before they will anyone else — because they view them as people who understand their futility and anguish, yet won't betray their confidences.").

219. See O. MOWRER, *THE NEW GROUP THERAPY* 13 (1964); see also O. MOWRER, *THE CRISIS OF PSYCHIATRY AND RELIGION* 60-80 (1961).

220. Mowrer contends that the church relies on Freudian theory, a theory which he deems a farce. O. MOWRER, *THE NEW GROUP THERAPY*, *supra* note 219, at 14-15. Adams lends credibility to Mowrer's contention by stating that many counseling books for the clergy are based on a Freudian ethic of nonresponsibility. J. ADAMS, *COMPETENT*, *supra* note 79, at 18. Today, many others question the validity of Freudian theory on suicide. See, e.g., D. EVERSTINE & L. EVERSTINE, *supra* note 92, at 203-05.

221. See O. MOWRER, *THE CRISIS OF PSYCHIATRY AND RELIGION*, *supra* note 219, at 202-03; FRANKL, *THE DOCTOR AND THE SOUL* ix-xxi (1968). Frankl suggests a theory of logotherapy which would supplement psychotherapy by enabling the therapist to objectively assess a person's spiritual distress. *Id.* at 17.

222. See *supra* notes 84-88 and accompanying text.

times coincide with one another. With respect to confession, the Christian may call it biblical,²²³ and the psychologist may call it therapeutic, but both encourage it as a method of treatment.²²⁴

Even when they differ in theory, the secular and nonsecular counselors can complement one another. Knowledge of the importance of direct questions about a counselee's suicidal intentions would not burden the pastoral counselor in the practice of his religion even if the counselor believed it was unbiblical to refer to secular professionals.²²⁵ Similarly, an understanding of an individual's spiritual struggle would not burden the mental health professional in the implementation of his treatment.²²⁶ Such knowledge and such understanding would only enhance the ability of those counselors to prevent suicide.²²⁷

D. *An Alternative to a Legal Duty to Refer*

The integrated, community approach to suicide prevention provides a forum where counselors can communicate and learn from one another.²²⁸ The state cannot simply mandate that the

223. "Therefore confess your sins to each other and pray for each other so that you may be healed." *James* 5:16 (New International). "If we confess our sins, he [God] is faithful and just and will forgive us our sins and purify us from all unrighteousness." 1 *John* 1:9 (New International).

224. When counseling a suicidal counselee, Adams stated that "[c]ounselors should acknowledge that he [the counselee] is probably right about the present worthlessness of his life, and should attempt to discover how bad he has been. However, they should take issue with his proposed solution, and instead point him to God's solution through repentance and holy living." J. ADAMS, *COMPETENT*, *supra* note 79, at 140-41 n.1. Mowrer describes a Protestant minister who overcame extreme anxiety by being openly honest about himself. O. MOWRER, *THE NEW GROUP THERAPY*, *supra* note 219, at 72-90. Mowrer also relates the story of a woman who overcame her suicidal behavior through an open and honest confession of her past. *Id.* at 110-16.

225. See *supra* notes 105-09, 174-92 and accompanying text.

226. See *supra* notes 87-88 and accompanying text.

227. See *supra* notes 200-15 and accompanying text. The content of the counseling provided by the defendant pastors is unknown. Likewise, it is not known if the mental health professionals who saw Nally were aware of his spiritual struggle. The pastors should have directly questioned Nally about his suicidal intentions. Furthermore, the mental health professionals should have had an understanding of the struggle Nally may have had with the eternal consequences of suicide, for example, whether one who committed suicide would go to hell. See *Nally v. Grace Community Church of the Valley*, 240 Cal. Rptr. 215, 238 (1987) (review granted for California Supreme Court opinion, not printed in official reporter, see 194 Cal. App. 3d 1147 (1987)), *rev'd*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (1989).

228. See *supra* notes 92-109 and accompanying text.

clergy get involved in suicide prevention because that would raise the same constitutional questions raised by imposing a duty to refer.²²⁹ The state may, however, mandate that the clergy be invited to participate in various research and prevention programs.

Legislation which incorporates the joint efforts of schools, teachers, parents, law enforcement officers, social service agencies and others interested in suicide prevention, already exists.²³⁰ The clergy should be incorporated into such legislation, as in New York, where the law expressly includes the clergy among those to be educated about suicide prevention.²³¹

The church has demonstrated a willingness and a desire to learn about suicide prevention and, when given the opportunity, participates in prevention programs.²³² The more knowledgeable the church becomes, the more apt the church will be to create its own standards for pastoral counseling of suicidal individuals. One Christian writer recommended that the church establish an ordination exam for ministers comparable to a bar exam for lawyers.²³³ The church could conceivably examine candidates on their knowledge of suicide prevention, and could mandate that suicide prevention courses be a prerequisite to ordination.

Ultimately, the decision for such modifications must rest with the church, just as the decision to incorporate a community approach would rest with an individual mental health professional. What must be protected is the church's discretion, and its absolute right pursuant to the first amendment, to counsel independently according to sincerely held religious beliefs.²³⁴

V. Conclusion

The tort of clergy malpractice in pastoral counseling was arguably established through an effort to hold pastoral counselors legally accountable for one young man's suicide, and to prevent

229. See *supra* notes 53-88, 174-92 and accompanying text.

230. See *supra* notes 92-104 and accompanying text.

231. See *supra* note 104 and accompanying text.

232. See *supra* notes 216-17 and accompanying text. The 1989 Christian Teachers Convention in Albany, New York included a forum on suicide: "Suicide?? It Can't Happen Here — Can It??".

233. Mitchell, *supra* note 28, at 14.

234. See *supra* notes 174-92 and accompanying text.

further suicides. Suicide is a tragedy which profoundly effects all those left behind. The overwhelming interest in the prevention of suicide and the preservation of life is shared by all. This is one area in which the church and the state are not at odds with each other.

However, clergy malpractice actions will not bring about the intended result of suicide prevention. Not only are such actions an unconstitutional infringement of the free exercise and establishment clauses, but they are also ineffective in preventing the occurrence of suicide. Rather than get embroiled in a controversial first amendment battle over an action which holds no promise as a preventive measure, the church and the state should endeavor to maintain an approach which preserves liberty and protects life.

"[A]ny man's death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; It tolls for thee."²³⁵

C. Grace McCaffrey

235. THE COMPLETE POETRY AND SELECTED PROSE OF JOHN DONNE & THE COMPLETE POETRY OF WILLIAM BLAKE 332 (1941) (emphasis omitted).